UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 3:98 CR 241 (CFD)
	:	Civ. No. 3:04 CV 1377 (CFD)
	:	
JOSE QUINONEZ	:	

RULING

On December 28, 1999, after a plea of guilty, this Court sentenced Jose Quinonez to a term of imprisonment of 170 months for conspiracy to distribute at least one kilogram of heroin, in violation of 21 U.S.C. § 846. Quinonez did not file a direct appeal of this sentence.[1] On August 19, 2004, however, he filed a motion pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody with this Court, claiming that: (1) his guilty plea was invalid under Fed. R. Civ. P. 11 because it was not knowingly and intelligently made; (2) his attorney was ineffective because he failed to file an appeal of the sentence; and (3) his sentence was increased in violation of Blakely v. Washington, __ U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). On November 4, 2004, the government filed its response to the motion. On December 13, 2004, Quinonez filed a reply and rebuttal to the government's response. For the following reasons, Quinonez's motion is **DENIED**.

I Jurisdiction

The government argues that because the petitioner's conviction became final on December 28, 1999, his § 2255 motion, which was filed more than four years later on August 19, 2004, is untimely under § 2255(1) and must be denied. Section 2255 provides:

[1]The Court advised Quinonez at his sentencing that we must file a direct appeal within ten days.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

The time to bring a § 2255 motion is not unlimited, however, as Congress has provided that a "1-year period of limitation shall apply to a motion under this section." Id; see also Baldayaque v. U.S., 338 F.3d 145, 150 (2d Cir. 2003) (noting that the one-year limitation in § 2255 was added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA")). The one-year statutory limitation period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
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> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
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> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id. It is undisputed that the instant motion was filed more than one year from the date the judgment of conviction became final. See § 2555(1); Green v. United States, 260 F.3d 78, 80 (2d Cir. 2001) ("Congress imposed a '1-year period of limitation' on section 2255 motions, which runs, in this case, from 'the date on which the judgment of conviction becomes final' ").

Moreover, it does not appear that any of the exceptions set forth in § 2255, which extend the starting date of the limitation period beyond the date the judgment of conviction became final, are applicable to the instant case. Quinonez has not identified any "impediment" to making

his motion that was created by the government, so as to implicate § 2255(2). Quinonez also has not identified a date subsequent to his sentencing when any facts supporting his claim presented could have been discovered through the exercise of due diligence, so as to implicate 2255(4).

The only paragraph arguably implicated by the arguments set forth in the motion is 2255(3), which extends the starting date for the limitation period to the "date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Quinonez argues that his sentence was unconstitutionally enhanced based on the amount of heroin attributed to him in violation of the Supreme Court's decision in Blakely v. Washington, __ U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). If Blakely, which was decided on June 24, 2004, did announce a new constitutional right retroactively applicable to Quinonez, then his motion, which was filed on August 19, 2004, would be timely under § 2255(3).

Blakely provides that "the 'statutory maximum' for Apprendi[2] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 124 S.Ct at 2537 (citations omitted; emphasis omitted). In Blakely, however, the Supreme Court only was addressing the sentencing scheme employed by the state of Washington, and explicitly instructed that "[t]he Federal Guidelines are not before us, and we express no opinion on them." Id at 2538 n. 9. Consequently, Blakely did not announce a new right applicable to Quinonez and his motion is untimely.

Since Quinonez filed the instant petition, however, the Supreme Court extended the

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[2]See Apprendi v. New Jersey, 530 U.S. 466, 490 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

rationales of Apprendi and Blakely to the federal sentencing guidelines, holding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." United States v. Booker, --- U.S. ----, 125 S.Ct. 738, 756 (2005). In the "remedial" portion of that opinion, the Supreme Court severed and excised two sections of the sentencing guidelines–subsection 3553(b)(1) (mandating use of the guidelines) and section 3742(e) (which set forth standards of review on appeal)–thereby making the guidelines advisory, rather than mandatory, in future sentencings. Id. at 756-57.

The holding of Booker, however, is limited to all cases on pending on direct review. Id at 769 ("we must apply today's holdings--both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act--to all cases on direct review"); U.S. v. Crosby, __ F.3d __, __, (2d. Cir. 2005) ("[s]ince Crosby's case is now pending on direct review, Booker/Fanfan must be applied to this appeal"). Quinonez is not proceeding on direct appeal, but rather collaterally attacks his sentence pursuant to § 2255. Because Booker did not announce a new right retroactively applicable to Quinonez, his motion is untimely. See U.S. v. Guzman, 404 F.3d 139, 140 (2d Cir. 2005) ("hold[ing] that Booker does not apply retroactively to cases on collateral review"); see also McReynolds v. United States, 397 F.3d 479, 2005 WL 237642 (7th Cir. 2005) ("Booker does not apply retroactively to criminal cases that became final before its release date on January 12, 2005"); Hamdani v. U.S., 2005 WL 419727 (E.D.N.Y., Feb 22, 2005) (finding that Booker did not apply retroactively to petitioner's § 2255 challenge to his sentencing enhancements); Rucker v. U.S., 2005 WL 331336 (D.Utah, Feb. 10, 2005) (rejecting a petitioner's § 2255 argument that "Blakely (and implicitly Booker) should be applied retroactively to him and, therefore, that his sentence was unconstitutional").

In sum, the Court finds that the instant motion was filed more than one year from the date the judgment of conviction became final, and none of the exceptions that extend the one year limitation period applies. Consequently, the motion to vacate, set aside or correct sentence by a person in federal custody **[Doc. #618]** is **DENIED** as untimely.[3]

SO ORDERED this 31st day of May 2005, at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

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[3]The Court is aware that an untimely § 2255 motion may be saved by the doctrine of equitable tolling. As the Second Circuit has explained:

> To equitably toll the one-year limitations period, a petitioner must show that extraordinary circumstances prevented him from filing his petition on time, and he must have acted with reasonable diligence throughout the period he seeks to toll. To show that extraordinary circumstances prevented him from filing his petition on time, petitioner must demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances. Hence, if the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing.

Baldayaque v. U.S., 338 F.3d 145, 150 (2d Cir. 2003). Equitable relief, such as tolling, may be "awarded in the court's discretion only upon consideration of all the facts and circumstances." Vitarroz Corp. v. Borden, Inc., 644 F.2d 960, 965 (2d Cir. 1981). After reviewing the facts and circumstances of the instant case, the Court finds that there are no "extraordinary circumstances" that prevented Quinonez from bringing this motion in a timely fashion, and that he failed to show that he "acted with reasonable diligence throughout the period he seeks to toll." Baldayaque, 338 F.3d at 150. Consequently, Quinonez is not entitled to equitable tolling relief.